



Lyn Magee (“Magee”) pleaded guilty in Marion Superior Court to Class A felony rape. Sentenced to thirty years with twenty-five years executed, Magee appeals his sentence raising two issues, which we restate as:

I. Whether the trial court abused its discretion by denying Magee’s motion to continue the sentencing hearing; and,

II. Whether the trial court abused its discretion by failing to consider evidence of mitigating factors.

Concluding that the trial court did not abuse its discretion, we affirm.

### **Facts and Procedural History**

In December 2004, Magee lived with his fiancée and her thirteen-year-old daughter M.J. On the morning of December 14, 2004, Magee forced his penis into M.J.’s vagina, causing her extreme pain. When she got to school later that morning, M.J. reported the incident, as well as other instances of abuse, to school authorities.

The State charged Magee with two counts of Class A felony child molesting and one count of Class D felony battery. On April 17, 2006, the date scheduled for jury trial, Magee entered into a plea agreement where he agreed to plead guilty to an amended count of Class A felony rape. In exchange, the State agreed to dismiss the remaining charges. The plea agreement left sentencing to the court’s discretion with a cap of twenty-five years executed. Magee also agreed that his entry into the plea agreement would not be considered as a mitigating factor.

The trial court accepted the plea agreement, ordered a pre-sentence investigation, and set a sentencing hearing for May 5, 2006. On that date, Magee filed a motion for continuance. At the outset of the sentencing hearing, Magee’s counsel renewed the

motion, requesting additional time to explore possible mitigating evidence that, as a child, Magee had witnessed abuse by his father and stepfather. The trial court denied the motion, noting that “Mr. Magee is present in person and can testify as to the matters counsel addressed as well as his sister, who is present in person should counsel choose to call her.” Tr. pp. 24-25.

The trial court found M.J.’s age to be a significant aggravating circumstance. The court also found past abuse “of Defendant or that observed by the Defendant” to be a mitigating factor of limited weight, noting “[w]hile its an explanation, I don’t believe that adults have the right to share that pain or inflict it on another person, especially a child.” Tr. p. 78. Finding that the aggravating circumstance outweighed the mitigating circumstance, the trial court sentenced Magee to thirty years with twenty-five years executed. Magee now appeals.

### **I. Motion for Continuance**

Magee contends that the trial court abused its discretion when it denied his motion to continue the sentencing hearing. The decision whether to grant a continuance, when the motion is not based upon statutory grounds, lies within the discretion of the trial court and will not be reversed absent a clear showing of an abuse of discretion. Harris v. State, 659 N.E.2d 522, 527 (Ind. 1995). The appellant must overcome a strong presumption that the trial court properly exercised its discretion. Warner v. State, 773 N.E.2d 239, 247 (Ind. 2002). In addition, the appellant must make a specific showing of how he was prejudiced as a result of the trial court’s denial of his motion. Harris, 659 N.E.2d at 527.

Magee contends that a continuance would have enabled him to present “additional mitigation information[.]” Br. of Appellant at 5. However, Magee and his sister were both available to testify at the sentencing hearing as to any abuse he suffered or witnessed as a child. While Magee chose not to testify, his sister testified that their father was an alcoholic who physically fought with their mother, and that the children heard, but did not see, the incidents. Tr. pp. 42-43. She also testified that when their mother remarried, their stepfather “had a temper” and “was kind of mean you know but he never like beat us or anything like that[.]” Tr. p. 44. Magee offers no specific showing of how he was prejudiced by the trial court’s denial of his motion to continue. Therefore, we cannot conclude that the trial court abused its discretion.

## **II. Evidence of Mitigating Circumstances**

Next, Magee argues that the trial court abused its discretion by failing to consider certain evidence of mitigating circumstances. Specifically, he contends that the trial court failed to consider the pre-sentence investigation report and failed to consider “testimonial evidence regarding Magee’s character[,], his work history, his involvement in his church, or his general character and nature outside of this offense[.]” Br. of Appellant at 12.

First, we observe that the trial court referred to Magee’s PSI in noting that his criminal history was not a relevant aggravator. Tr. p. 78. In addition, Magee called a series of witnesses to testify at sentencing. However, a trial court is not obligated to find a circumstance to be mitigating simply because it is offered by a defendant as a mitigating circumstance. Highbaugh v. State, 773 N.E.2d 247, 252 (Ind. 2002).

Additionally, a trial court is not obligated to weigh or credit the mitigating factor the same as the defendant requests. Id. Upon appeal, a defendant must show that the proffered mitigating circumstance is both significant and clearly supported by the record. Id.

Magee makes no argument as to why his character, work history, or church involvement are significant mitigating circumstances. Thus, the trial court did not abuse its discretion when it declined to find them entitled to significant mitigating weight.

### **III. Conclusion**

The trial court did not abuse its discretion when it denied Magee's motion to continue his sentencing hearing. Moreover, the trial court did not abuse its discretion when it declined to find certain mitigating circumstances.

Affirmed.

NAJAM, J., and MAY, J., concur.